

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
June 26, 2007 Session

TERRY LYNN BYINGTON v. STATE OF TENNESSEE

**Direct Appeal from the Criminal Court for Sullivan County
No. C50,820 Phyllis H. Miller, Judge**

No. E2006-01712-CCA-R3-PC - Filed November 26, 2007

Petitioner, Terry Lynn Byington, appeals the post-conviction court's denial of his petition for post-conviction relief in which he alleged the ineffective assistance of counsel on appeal. After a thorough review of the record, we reverse the judgment of the post-conviction court and remand this case to allow Petitioner a delayed appeal, provided he files a motion for new trial within thirty days of the issuance of the mandate in the case. Counsel in this appeal is appointed to represent Petitioner in the delayed appeal.

**Tenn. R. App. P. 3 Appeal as of Right;
Judgment of the Criminal Court Reversed and Remanded**

THOMAS T. WOODALL, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and D. KELLY THOMAS, JR., J., joined.

Michael F. McClellan Carrico, Gate City, Virginia, for the appellant, Terry Lynn Byington.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel West Harmon, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; and William B. Harper, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

I. Background

Following a jury trial, Petitioner was convicted of driving under the influence, fourth offense, and driving on a revoked license. The trial court sentenced Petitioner to an effective sentence of four years as a Range II, multiple offender. The facts supporting Petitioner's convictions were summarized by this Court as follows:

Officer Eric Alford, a patrol officer with the Kingsport Police Department, testified that on June 15, 2001, while traveling on East Stone Drive in Kingsport, Tennessee,

he observed the defendant drive his pickup truck across the center line of a six-lane road twice within a short distance. Officer Alford stated he further observed the defendant's vehicle approach a yellow light at an intersection without slowing. The light changed to red as the vehicle entered the intersection, and the vehicle stopped in the middle of the intersection under the traffic light. Officer Alford initiated a traffic stop.

Officer Alford testified he observed a "very strong" odor of alcohol; the defendant's speech was slurred; and he appeared to be intoxicated. The defendant informed the officer that he had been to Hog Wild, a local bar, that he had consumed seven or eight beers, and that he knew he should not be driving.

Officer Alford asked the defendant to exit his vehicle and conducted a series of field sobriety tests. The officer testified the defendant performed "poorly" on the finger-to-nose test and touched his upper lip rather than the tip of his nose on two occasions. Officer Alford stated the defendant performed "[v]ery poorly" on the walk-and-turn test and was "staggering." The officer explained that he did not ask the defendant to perform the one legged stand test because "it was pointless as far as his balance and trying to perform the test accurately." Officer Alford testified that based upon his experience and observations, he believed the defendant was too intoxicated to operate a vehicle.

Upon transporting the defendant to the city jail, Officer Alford asked the defendant to take a breathalyzer test and explained the consequences of his refusal; nevertheless, the defendant refused. The officer subsequently learned that the defendant's license had been revoked.

State v. Terry Byington, No. E2003-02814-CCA-R3-CD, 2004 WL 934902, *1 (Tenn. Crim. App., at Knoxville, Apr. 30, 2004), *perm. to appeal denied* (Tenn. Oct. 4, 2004).

Petitioner's counsel filed an untimely motion for new trial. A hearing on the untimely motion, however, was apparently heard by the trial court on June 27, 2003, and the trial court denied the untimely motion. On appeal, a panel of this Court determined that Petitioner had untimely filed a motion for new trial, and all issues, other than those pertaining to sentencing and the sufficiency of the convicting evidence, were thus waived, stating:

Due to the untimely motion for new trial, the defendant has waived the following issues: (1) whether Officer Alford's testimony regarding field sobriety testing was inadmissible expert testimony; (2) whether the defendant's prior perjury conviction would be admissible if he had testified at trial even though the conviction was more than ten years old; and (3) whether the trial judge erred in failing to recuse herself from the proceedings. Furthermore, we have examined these issues for plain error and conclude they are totally without merit. *See* Tenn. R. Crim. P. 52(b). However,

we will address the sufficiency of the evidence and sentencing issues because these issues are reviewable notwithstanding the untimely motion for new trial. *See State v. Boxley*, 76 S.W.3d 381, 390 (Tenn. Crim. App. 2001).

Id. 2004 WL 934902, at *2.

II. Post-Conviction Hearing

At the post-conviction hearing, Petitioner contended that his counsel's assistance was deficient because he failed to timely file a motion for new trial. Petitioner testified that he had particularly wanted to appeal the trial court's denial of his motion to recuse. The trial judge had previously been employed as an assistant district attorney and had prosecuted Petitioner for violation of a habitual motor vehicle offender order, which Petitioner testified occurred in 1986. The prosecution resulted in Petitioner's entry of a plea of guilty to this offense. The 1986 conviction was used to determine Petitioner's range for sentencing purposes in the case pertaining to this post-conviction proceeding. Petitioner said that trial counsel did not present any evidence on the recusal issue or any other issue at the hearing on his late-filed motion for new trial. Petitioner acknowledged that trial counsel presented mitigating factors at the sentencing hearing.

On cross-examination, Petitioner acknowledged that the motion for recusal had been argued prior to trial, and no new evidence was available for presentation at the hearing on the motion for new trial. Petitioner acknowledged that he testified at the sentencing hearing and presented mitigating evidence based on his work history and family in support of his request for alternative sentencing.

Petitioner's counsel testified that he had been a criminal defense lawyer for approximately nineteen years, and the majority of his trial experience involved DUI cases. Counsel was appointed to represent Petitioner in the case *sub judice* at the sentencing phase. Counsel acknowledged that he had untimely filed a motion for new trial. He stated that he represented Petitioner on the instant case and another case which also involved DUI charges, and he had inadvertently filed the motion for new trial under the second case's assigned case number.

Counsel stated that a motion for recusal by the trial court was filed prior to trial, and it was denied. The motion was renewed after trial and raised as an issue in the untimely motion for new trial. Counsel said that he was not aware of any additional issues of merit which were not raised in the untimely motion for new trial and on appeal.

III. Standard of Review

To sustain a petition for post-conviction relief, a defendant must prove his or her factual allegations by clear and convincing evidence at an evidentiary hearing. *See* T.C.A. § 40-30-110(f); *Momon v. State*, 18 S.W.3d 152, 156 (Tenn. 1999). The post-conviction court's findings of fact are conclusive on appeal unless the evidence preponderates otherwise. *See State v. Burns*, 6 S.W.3d

453, 461 (Tenn. 1999). During our review of the issue raised, we will afford those findings of fact the weight of a jury verdict, and this Court is bound by the trial court's findings unless the evidence in the record preponderates against those findings. *See Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997); *Alley v. State*, 958 S.W.2d 138, 147 (Tenn. Crim. App. 1997). This Court may not reweigh or re-evaluate the evidence, nor substitute its inferences for those drawn by the post-conviction court. *See State v. Honeycutt*, 54 S.W.3d 762, 766 (Tenn. 2001). All questions concerning the credibility of the witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the trial judge, not the appellate courts. *See Momon*, 18 S.W.3d at 156; *Henley*, 960 S.W.2d at 578-79. However, the post-conviction court's conclusions of law are reviewed under a purely *de novo* standard with no presumption of correctness. *See Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001).

When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, the petitioner bears the burden of showing that (a) the services rendered by trial counsel were deficient and (b) that the deficient performance was prejudicial. *See Powers v. State*, 942 S.W.2d 551, 558 (Tenn. Crim. App. 1996). In order to demonstrate deficient performance, the petitioner must show that the services rendered or the advice given was below "the range of competence demanded of attorneys in criminal cases." *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). In order to demonstrate prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984). "Because a petitioner must establish both prongs of the test to prevail on a claim of ineffective assistance of counsel, failure to prove either deficient performance or resulting prejudice provides a sufficient basis to deny relief on the claim." *Henley*, 960 S.W.2d at 580.

As noted above, this Court will afford the post-conviction court's factual findings a presumption of correctness, rendering them conclusive on appeal unless the record preponderates against the court's findings. *See id.* at 578. However, our supreme court has "determined that issues of deficient performance by counsel and possible prejudice to the defense are mixed questions of law and fact . . .; thus, [appellate] review of [these issues] is *de novo*" with no presumption of correctness. *Burns*, 6 S.W.3d at 461.

Furthermore, on claims of ineffective assistance of counsel, the petitioner is not entitled to the benefit of hindsight. *See Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994). This Court may not second-guess a reasonably based trial strategy, and we cannot grant relief based on a sound, but unsuccessful, tactical decision made during the course of the proceedings. *See id.* However, such deference to the tactical decisions of counsel applies only if counsel makes those decisions after adequate preparation for the case. *See Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

IV. Analysis

Petitioner contends that his counsel rendered ineffective assistance of counsel by failing to timely file a motion for new trial. Petitioner contends that he was prejudiced by such conduct because he was unable to present issues on appeal other than the sufficiency of the convicting evidence and sentencing issues. *See Boxley*, 76 S.W.3d at 390 (concluding that despite an untimely motion for new trial, this Court may review the issues of sufficiency of the evidence and sentencing).

At the conclusion of the evidentiary hearing, the post-conviction court stated:

[w]hile the Court does find that [counsel's] performance as an attorney in Case No. S45,791 was deficient due to his not filing a timely motion for new trial and that the petitioner intended the motion for new trial that was filed to raise issues before the appellate court other than the sufficiency of the evidence and sentence, the Court finds that the appellate court did consider those other issues under Tenn. Crim. P. Rule 52(b) and did make a finding regarding those issues, that is, that they were "totally without merit."

In *State v. Terry Byington*, a panel of this Court held that because of the untimely filing of his motion for new trial, Petitioner waived all issues for purposes of appeal other than the sufficiency of the evidence and sentencing issues. *Terry Byington*, 2004 WL 934902, at *2. The court's observation without analysis that Petitioner's other issues were without merit was thus dicta. *Id.*

In *Wallace v. State*, 121 S.W.3d 652 (Tenn. 2003), the petitioner sought post-conviction relief in the form of a delayed appeal on the ground that his trial counsel's assistance had been ineffective for failing to timely file a motion for new trial thereby precluding appellate review of all issues other than the sufficiency of the convicting evidence and sentencing issues. *Id.* at 654. The supreme court observed first that the prejudice prong of *Strickland* cannot be resolved "simply by reasoning that [the petitioner] had direct review on the issue of sufficiency of evidence alone." *Id.* at 658. The court concluded that "a petitioner in a post-conviction proceeding must establish that he or she intended to file a motion for new trial and that, but for the deficient representation of counsel, a motion for new trial could have been filed raising issues in addition to the sufficiency of the evidence." *Id.* at 659.

Petitioner testified, and the post-conviction court so found, that he intended to challenge issues other than the sufficiency of the evidence and sentencing on appeal. A panel of this Court held that those issues were waived. We conclude that under *Wallace*, Petitioner is entitled to post-conviction relief in the form of a delayed appeal.

We note that during the hearing on his untimely filed motion for new trial, Petitioner presented three issues: that the assistance of trial counsel was ineffective; that the trial court erred in not recusing herself; and that the evidence preponderated against the verdict. Petitioner withdrew the ineffective assistance of counsel issue during the hearing. On appeal, in addition to the

sufficiency of the evidence and sentencing issues, Petitioner offered three additional issues which were apparently not included in the untimely motion for new trial. However, because the thirty-day rule applicable to the filing of a motion for new trial is jurisdictional, an untimely motion is a nullity. *State v. Dodson*, 780 S.W.2d 778, 780 (Tenn. Crim. App. 1989). Thus, Petitioner is not limited to the issues raised in his untimely filed motion for new trial when he files a motion for new trial preparatory to pursuing a delayed appeal.

CONCLUSION

After a thorough review, we reverse the judgment of the post-conviction court, and grant Petitioner post-conviction relief to the extent that he is granted a delayed appeal in Sullivan County Criminal Court case no. S45,791. Petitioner shall have thirty days from the date of the mandate of this Court to file a timely motion for new trial.

THOMAS T. WOODALL, JUDGE